

Hypothetical Case
Parliamentary Chicken
An investment case filed under NAFTA

This case concerns Parliamentary Chicken (PC), a large Canadian conglomerate. The company has developed new techniques for the computerized automation of egg and dressed chicken production, for treatment and disposal of chicken wastes, and a crematorium for the incineration of dead chickens. The company's chicken waste treatment and incineration technologies are superior to those employed by United States chicken farmers and processors. Its computerized production methods also offer the company significant cost and efficiency advantages over its competitors in North America. Fully integrated facilities can typically house over 10,000,000 chickens each. In 1975 the State of Delabama was given full authority under the federal Clean Water Act to regulate large and mega-farms, but to date has failed to issue any permits to any large farm with over 1000 animal units. In 1996, PC entered into contracts to buy out a number of large chicken farms, cooperatives and corporations in rural mid-Delabama. Several months later, a group of local farmers, cooperatives and poultry processors filed suit in the local Delabama court, presenting claims for breach of contract, anti-competitive practices, and state anti-trust violations. They claimed \$20,000,000 in actual damages and an unspecified amount of punitive damages. The case went to trial in early 1998 before a local jury. Plaintiffs' attorneys repeatedly made reference to the fact that PC was a Canadian company, but PC's lawyers failed to object to those references. After a month of trial, the jury awarded \$810 M in damages, with \$110 M allocated for actual damages and \$700 M in punitive damages.

Delabama law, which is unique in the United States, but which is very similar to the law of most other English common law countries (including Canada), requires that a bond in the amount of 133% of the judgment be posted to stay the judgment of the lower court pending appeal. Instead of appealing the judgment directly, Parliamentary Chicken appealed the requirement of posting the bond. The state appellate court certified the case to the Supreme Court of Delabama, which ruled in early 1999 that PC must comply with the requirement for the appeal bond. Parliamentary Chicken did not seek certiorari to the U.S. Supreme Court and decided it really could neither afford the bond nor the judgment. PC consulted with experts on United States bankruptcy law on filing for Chapter 11 reorganization as method of staying the state court judgment, but in the end decided not to do so for other business reasons. Believing it was being forced to settle the state court case, PC and the plaintiffs reached a settlement in the amount of \$235 M, which PC considers an outrageous sum, but which it could afford. PC vows never to do business again in Delabama.

Under NAFTA, a "measure" is defined in Article 201 as follows: "measure includes any law, regulation, procedure, requirement or practice."

In late 1999, PC filed a request for dispute settlement under Chapter 11 of NAFTA, alleging that in violation of NAFTA its investment in the United States had been irreparably harmed by the State's appeal bond requirement and by the decisions of the Delabama courts. It seeks \$260 M in actual damages against the United States (\$235 M for the judgment and \$35 M for its expenses in defending

and settling the legal actions) and \$420 M in compensation for the subsequent decline in the value of its stock and other business damages, which were the direct or indirect result of the Delabama lawsuit. Specifically, PC alleges:

1. that the bond requirement is a “measure” that effectively “expropriated” or seized its assets without providing compensation;
2. that its right to appeal was effectively foreclosed by the bond requirement;
3. that the jury award of punitive damages was not proportional to the amount sought by the plaintiffs;
4. that the company’s current and anticipated financial difficulties have been caused by the denial of justice in the United States in violation of its investor rights under NAFTA to fair and equal treatment; and
5. that the company’s superior production techniques and environmental control technologies have been unjustifiably discriminated against by the United States in violation of NAFTA;

In its defense the United States alleges:

1. that the judgments of the courts of the State of Delabama do not constitute a “measure” under Article 201 of NAFTA, and thus the NAFTA panel is without jurisdiction to hear the dispute;
2. in the alternative, that if the judgment of a court of a country can constitute a “measure” under Article 201 of NAFTA, then only the judgment of the highest court of one of the three countries constitutes a “measure” under NAFTA, and PC failed to seek certiorari to the U.S. Supreme Court;
3. that PC had the opportunity to file bankruptcy to stay the requirement of posting the bond, but failed to do so;
4. that under Article 105 of NAFTA, the United States cannot be held strictly liable for the action of one of its states where it had no opportunity to remedy the difficulties encountered by PC; i.e, PC made no effort to avail itself of the opportunity to seek redress in the federal courts, where the U.S. could have become a party or amicus, or advise the U.S. government of it situation;
5. that only a Party, in this instance Canada, not a Canadian enterprise or person, such as PC, can raise the issue under NAFTA that its goods and services have been unjustifiable discriminated against;
6. that, because PC failed to object at trial about the “Canadian company” references, it has waived any claim that it has been unjustifiably discriminated against before the NAFTA panel.

In press interviews and demonstrations, citizen groups in the United States have expressed outrage because:

1. the U.S. government has not released any information about this NAFTA case;
2. NAFTA empowers PC to pursue its case before an international tribunal where the proceedings are secret and the records not publicly accessible;
3. since the tribunal's decision will be final and binding, the U.S. has no recourse to appeal (outside of the panel's own limited appellate process);
4. there is no role for public participation in the legal proceedings;
5. amicus curiae briefs will not be accepted by the NAFTA panel;
6. despite an obvious interest in upholding the laws and verdict at stake in PC's suit, neither the State of Delabama nor the plaintiff's lawyers - none of whom have even been notified of PC's NAFTA claim - can participate in the defense (U.S. courts, however, are required under NAFTA to enforce any judgment against the United States);
7. PC's use of NAFTA to escape the Delabama jury verdict (and subsequent settlement) threatens the very core of the civil justice system in the U.S.;
8. under legal theories advanced by PC, almost any type of civil verdict or court decision imposing a requirement on a foreign corporate defendant could be challenged as "NAFTA illegal;"
9. because the definition of "foreign" is so broad under NAFTA, this precedent could pave the way for multi-national corporation efforts that could, in effect, overturn jury verdicts in products liability and toxic tort cases and punitive damage awards in employment discrimination cases or actions based on consumer fraud;
10. if PC is successful in attacking the punitive damage award as illegal under NAFTA, it could mean the end of punitive damages against corporations covered by the trade agreement, in effect creating a "back door" immunity from punitive damages, where companies' efforts to reduce or eliminate punitive damage awards have been unsuccessful in the legislative arena;
11. if PC's challenge is successful, it would mean that U.S. taxpayers - not corporate defendants - would end up footing the bill when a corporation is found liable by a jury for injury to others, eliminating both the concept of fairness and the deterrent effect of the United States' civil liability system;
12. PC is seeking to use NAFTA to force U.S. taxpayers to pay for its legal mistakes and failed courtroom strategy;
13. that NAFTA's supranational tribunals constituted of trade and investment experts can sit in judgment over the legal system of a sovereign nation poses a threat to the legal traditions of all NAFTA countries, not just the U.S.

PC also files a submission under Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), asserting:

1. that the applicable regulatory authorities in Delabama, including the United States, are not enforcing environmental laws, as defined in the NAAEC, relating to discharges of animal waste pollutants, with the result that substantial volumes of untreated animal

wastes, urine and excrement continue to be discharged into the waters of Delabama in violation of the Clean Water Act and the Delabama Clean Streams Act;

2. that the State of Delabama has repeatedly acknowledged that it has failed to issue Clean Water Act and/or State permits to all large animal feeding operations and that substantial volumes of unpermitted discharges of untreated animal waste pollutants continue unabated throughout the State to the detriment of the health and welfare of the residents of the State and the environment of the State;
3. that the United States Environmental Protection Agency and the Department of Justice have failed to file any legal actions against any unpermitted animal waste discharger in Delabama or failed to have otherwise enforced the Clean Water Act in that State against such dischargers; and that the United States has failed in its oversight responsibilities to ensure that its delegate, the State of Delabama, adequately carries out its permitting and enforcement responsibilities under the Clean Water Act.

PC requests the NAAEC Council to prepare a factual record on its submission that condemns the United States for its failures to enforce its environmental laws.

How should the NAFTA panel and the NAAEC Council decide the disputes before them?